Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

Page

Question Presented 1

Statement of the Case 2

The Separate Classification of Men and Women Under Water and Power's Plan Discriminates Against Women Both on Its Face and in Its Impact 4

A. Water and Power's Plan Discriminated Against Women on Its Face 4

B. Water and Power's Pension Plan Discriminated Against Women in Its Impact 9

The Interpretation of the Bennett Amendment in Gilbert Does Not Undermine the Judgment in Manhart 12

Conclusion 14

A. The Court of Appeals Decision Is Not in Conflict With Applicable Decisions of the Supreme Court 15

B. The Court of Appeals Has Not Departed From the Accepted Course of Judicial Proceedings as to Merit the Exercise of the Supreme Court's Supervision 16

TABLE OF AUTHORITIES CITED

Cases	Page
Bartmess v. Drewrys, U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971)	14
Califano v. Goldfarb, ..., U.S. ....., 97 S.Ct. 1021 (1977)	5, 7, 8, 11, 16
Craig v. Boren, ... U.S. ....., 97 S.Ct. 451 (1976)	5, 9, 16
Frontiero v. Richardson, 411 U.S. 677 (1973) ..	5, 7, 9, 11, 16
General Elec. Co. v. Gilbert, ... U.S. ....., 97 S.Ct. 401 (1976)	4, 5, 8, 9, 10 11, 12, 13, 14, 15, 16
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	5
Henderson v. Oregon, 405 F.Supp. 1271, 1277, appeal docketed, No. ....., 9th Cir. 1976 ..	10, 11
Jefferson v. Hackney, 406 U.S. 535 (1972)	5
Magnum Co. v. Coty, 262 U.S. 159 (1923)	14
Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971)	11, 16
Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969)	14
Reed v. Reed, 404 U.S. 71 (1971)	5, 9, 16
Rosen v. Public Service Gas and Elec. Co., 477 F. 2d 90 (3rd Cir., 1973)	14
Stanley v. Illinois, 405 U.S. 645 (1972)	7, 15

Regulations	Page
29 Code of Federal Regulations, Sec. 1604.9(e)	3
29 Code of Federal Regulations, Sec. 1604.9(f)	3

Rules	
Rules of the Supreme Court, Rule 19	14

Statutes	
California Constitution, Art. I, Sec. 1	3
California Constitution, Art. I, Sec. 21	3
California Government Code, Sec. 7500	3, 17
Civil Rights Act of 1964, Sec. 703(h)	12
Los Angeles City Charter, Sec. 220.1	12
United States Code, Title 29, Sec. 206(d)	12, 13
United States Code, Title 42, Sec. 1983	3
United States Code, Title 42, Sec. 2000-2(a)(1)	3
United States Code, Title 42, Sec. 2000-2(a)(2)	3
United States Code, Title 42, Sec. 2000e-2	2
United States Code, Title 42, Sec. 2000e-2(h)	12
United States Constitution, Fourteenth Amendment	3, 5

Textbook	
Legislative History of the Equal Employment Opportunity Act of 1972, United States Senate (U.S. Government Printing Office, Washington, D.C., 1972), p. 1844	14

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Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Question Presented.

The question presented in this case is as follows: Whether a retirement plan which required women employees to contribute from their wages 15 percent more than similarly situated male employees, because of the purported longer average life expectancy of women

as a class, thereby violated the Civil Rights Act of 1964, Title VII, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e-2 ("Title VII").[1]

Statement of the Case.

This is a class suit by female employees of the Los Angeles Department of Water and Power ("Water and Power") who are participating, or who have participated, in the Water and Power Employees' Retirement, Disability and Death Benefit Insurance Plan ("Plan" or "Pension Plan"). Plaintiffs brought suit on September 26, 1973 against Water and Power, members of the Board of Water and Power Commissioners ("Water and Power Commissioners") and members of the Board of Administration of Water and Power's Plan ("Plan Administrators"). Plaintiffs sued Water and Power Commissioners and Plan Administrators in their official capacities.

Water and Power's Plan required women to contribute from their wages 15 percent more to the Plan than men to receive the same benefits as men. This 15 percent differential was based on sex-segregated tables which purported to show that as a class women outlive men. Plaintiffs sought an injunction ordering defendants to equalize male and female contribution rates under the Plan and to grant class members restitution of money they were illegally forced to contribute to the Plan in excess of contributions made by their male counterparts.

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[1]Plaintiffs do not agree with the Questions Presented as set forth in defendants' Petition for Writ of Certiorari. Whether Water and Power's practice violated the Equal Pay Act is not at issue in this case. See *infra* at page 13.

The District Court permanently enjoined defendants under Title VII from requiring female Water and Power employees to make larger contributions to the Plan than their male counterparts.[2] The Court further awarded class members refunds of illegally required contributions made on and after April 5, 1972.[3] California Government Code §7500 made it unlawful after January 1, 1975 for Water and Power to operate its Plan with unequal male and female employee contributions. Accordingly, Water and Power equalized contribution rates effective January 1.

The District Court's decision in favor of plaintiffs was affirmed by the Ninth Circuit Court of Appeals on November 23, 1976 (amended December 23, 1976) and a rehearing was denied on April 18, 1977.[4] Defendants filed a Petition for Writ of Certiorari on June 29, 1977.

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[2]Title VII prohibits "[discrimination] against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex. . . ." It also proscribed the *segregation* or *classification* of employees "in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex. . . ." 42 U.S.C. §2000-2(a)(1),(2).

[3]On April 5, 1972, the Equal Employment Opportunity Commission amended its regulations to prohibit contribution rate differentials based on sex in employee benefit plans like the Plan at bench. The new regulations provide that "it shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other," 29 C.F.R. §1604.9(e), and "it shall be an unlawful employment practice for an employer to have a pension or retirement plan . . . which differentiates in benefits on the basis of sex." 29 C.F.R. §1604.9(f).

[4]Plaintiffs also brought suit under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §1983 and Article I, §§1 and 21 of the Constitution of the State of California [§21 is now embodied in §7(a)]. Plaintiffs' cause of action under the Fourteenth Amendment is still alive. Although the District Court dismissed plaintiffs' other causes of action, the Court of Appeals declined jurisdiction of these matters on the ground that the District Court's order of dismissal was not final.

The Separate Classification of Men and Women Under Water and Power's Plan Discriminates Against Women Both on Its Face and in Its Impact.

The Court in *General Elec. Co. v. Gilbert*, ... U.S. ...., 97 S.Ct. 401 (1976), set forth two tests for determining whether an employee benefit plan discriminates on the basis of sex in violation of Title VII:

(1) Is the plan discriminatory on its face; and, if not,

(2) Is the plan discriminatory in its impact?

Water and Power's Plan failed *both* these tests: It discriminated against women on its face and it discriminated against women in its impact.

A. Water and Power's Plan Discriminated Against Women on Its Face.

The classification tables used by Water and Power to determine employee contributions to its Pension Plan were based wholly on sex. Every man was treated like every other man and differently from every woman. Other more relevant factors affecting longevity of life, such as smoking and drinking habits, normality of weight, prior medical history, and family longevity history, were not used in determining contribution rates. The opinion of the Court of Appeals was narrowly circumscribed to this set of facts:

> "We do not pass judgment on the legality of a plan which determines contribution rates based on a significant number of actuarially determined characteristics, one of which is sex. Our holding is limited to the proposition that when sex is singled out as the only, or as a predominant, factor, the employee is being treated in the manner which Title VII forbids." 553 F.2d at 591.

The Court in *Gilbert* suggested, because of the similarities between the language used by Congress in Title VII and some of the decisions construing the equal protection clause of the Fourteenth Amendment, "that the latter are a useful starting point in interpreting the former." .... U.S. at ...., 97 S.Ct. at 407. We will begin our analysis here.

Where legislative classifications are based on sex, the Court has adopted an intermediate standard of scrutiny requiring more than just a rational connection between the classification and the statutory objective. *Cf. Jefferson v. Hackney*, 406 U.S. 535 (1972).[5] This standard was recently set forth by the Court in *Craig v. Boren*, ... U.S. ...., 97 S.Ct. 451 (1976): "To withstand Constitutional challenge, previous cases establish that classifications by gender must serve *important governmental objectives* and must be *substantially related* to the achievement of those objectives." .... U.S. at ...., 97 S.Ct. at 457. (Emphasis added.) On this basis, the Court held that the interest of the State of Oklahoma in traffic safety did not justify a statutory scheme prohibiting the sale of "non-intoxicating" 3.2 percent beer to males under the age of 21 but permitting it to females over the age of 18. See *Califano v. Goldfarb*, ... U.S. ...., 97 S.Ct. 1021 (1977); *Frontiero v. Richardson*, 411 U.S. 677 (1973); and *Reed v. Reed*, 404 U.S. 71 (1971).

The legislative purpose underlying Water and Power's Plan is twofold: (1) To provide retirement income

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[5]This higher standard is of special importance in Title VII cases where the purpose of the statute is to require employers to treat each employee as an individual, so that the employee's membership in a racial, ethnic, religious, or sexual group is irrelevant to employment decisions. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

to Plan participants; and (2) To provide an incentive for qualified job applicants to choose employment with, and remain at, Water and Power. The use of sex-segregated classification tables by Water and Power to determine contribution rates bore no "fair and substantial relation" to these objectives.

Although Water and Power's Plan provides equal benefits to male and female retirees, it charged its female employees 15 percent more for these benefits than its male employees. Water and Power has attempted to justify this contribution rate differential on the ground that it was necessary to the fiscal integrity of the Plan.

While Water and Power's justification may appear reasonable at first, on closer examination, its weaknesses become apparent. Thus, the Court of Appeals found that:

> "Even if it could be said that the relevant business function here involved is that of providing employees with a stable and secure pension program there is no showing that sexual discrimination is necessary to protect the essence of that function. Actuarial distinctions arguably enhance the ability of the employer and the pension administrators to predict costs and benefits more accurately, but it cannot be said that providing a financially sound pension plan requires an actuarial classification based wholly on sex." 553 F.2d at 587.

The Court went on to find that "[t]his is especially true when distinctions based on many other longevity factors (*e.g.*, smoking and drinking habits, normality of weight, prior medical history, family longevity history) are not used in determining contribution levels." 553 F.2d at 587.

Water and Power's decision to use gender based classification tables to determine contribution rate levels to its Plan was based on only one criterion: Administrative convenience. Although this objective may have some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois,* 405 U.S. 645, 656 (1972). See *Frontiero v. Richardson, supra,* and *Califano v. Goldfarb, supra.*[6]

The second purpose of Water and Power's Plan is to provide an incentive for qualified job applicants to choose employment with, and remain at, Water and Power. Thus, the Plan does not have its first practical effect when a participant becomes eligible to retire, but it begins to operate when he or she first accepts employment with Water and Power. The possibility that qualified male job applicants were encouraged to accept employment with, or dissuaded from leaving, Water and Power because of the differential treatment afforded them by the Pension Plan, at the very least, is speculative and remote.

Water and Power's claim that the use of non-gender based classification tables will result in male participants subsidizing female participants also is without merit. Because the death of each Plan participant occurs at a unique point in time, one participant is constantly subsidizing another participant. This is the nature of

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[6]Water and Power abandoned its use of sex-segregated classification tables on December 23, 1974, shortly before the District Court's decision in this case. The proof is in the pudding. There is nothing in the record to indicate that the financial stability of Water and Power's Plan is being threatened, and from all outward appearances, the Plan seems to be running well.

a group plan. The subsidization factor, however, is demonstrable in group actuarial terms only, and the difference in treatment of the individual male under sex-segregated tables and non-sex-segregated tables is practically immeasurable.

Water and Power's Plan differs significantly from the disability plan considered by the Court in *Gilbert*. Unlike Water and Power's Plan, the plan in *Gilbert* was not discriminatory on its face, but merely excluded from its coverage disabilities associated with pregnancy which is "an objectively identifiable physical condition with unique characteristics." ..... U.S. at ....., 97 S.Ct. at 407. Thus, the Court emphasized that:

> " 'The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.' [*Geduldig v. Aiello,*] 417 U.S. at 496-497, n. 20." ..... U.S. at ....., 97 S.Ct. at 407.

Water and Power's Plan also divides potential recipients into two groups—men and women. This classification, however, is solely gender based. The first group is exclusively male and the second group is exclusively female. This is a far cry from the disability plan in *Gilbert* and it is just the kind of gender based classification that the Court struck down as unconstitutional in *Califano v. Goldfarb, supra* (invalidating social security statutes requiring a widower to have been dependent on his wife for at least one-half of his support in order to receive survivor's benefits, but allowing a widow to receive such benefits without regard to whether she may have been dependent on her husband for any part of her support); *Craig v. Boren, supra; Frontiero v. Richardson, supra* (invalidating federal statutes requiring a servicewoman's husband to be dependent on her for more than one-half of his support before she could receive certain benefits for him as a dependent, but allowing a serviceman to claim his wife as a dependent for such benefits without regard to whether she was dependent on him for any part of her support); and *Reed v. Reed, supra* (invalidating an Idaho statute providing that, when two individuals are otherwise equally entitled to appointment as administrator of an estate, the male applicant must be preferred to the female applicant). These cases cannot be distinguished from the case at bench, are controlling, and preclude any need for review.

B. Water and Power's Pension Plan Discriminated Against Women in Its Impact.

The Court in *Gilbert* recognized that in Title VII actions, unlike in actions based on the equal protection clause, "our cases recognize that a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another." ..... U.S. at ....., 97 S.Ct. at 408. (Emphasis in original.) On this basis, the Court concluded that General Electric's plan was merely *underinclusive,* that is, it did not cover all disabilities in the universe of disabilities, and did not impact more heavily on women than men:

"As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefit plan is less than all inclusive [footnote omitted]. For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially even handed *inclusion of risks*." ..... U.S. ....., 97 S.Ct. at 409-410. (Emphasis in original.)

Under Water and Power's Plan, each man and woman did not receive equal benefits measured in terms of per dollar contributions. Because women as a class are purported to live longer than men, all women were required to contribute 15 percent more to the Plan that their male counterparts. As the Court of Appeals pointed out, "[n]ot all women live longer than men, yet each individual woman is required to contribute more, not because she as an individual will live longer, but because the members of her sexual group, on the average, live longer." 553 F.2d at 585. In fact, although women as a class live longer than men, "the great majority of men and women—84 percent—share common death ages." *Henderson v. Oregon*, 405 F.Supp. 1271, 1277, appeal docketed, No. ....., 9th Cir. 1976. Thus, only about one women out of six outlives her male counterpart. The remaining five out of six women will die having contributed more

to Water and Power's Plan than their male counterparts, but having received the same benefits.

Another result of Water and Power's aggregate approach is that short-lived women are forced to bear the additional costs attributed to long-lived women. This result runs contrary to the well established rule that a practice which penalizes some women because of their sex is prohibited by Title VII regardless of whether the practice discriminates against all, or even most, women. *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971).[7]

Water and Power's Plan also can be distinguished from the disability plan in *Gilbert* in terms of risk coverage. As stated above, Water and Power's Plan provides participants with monthly checks typically used to satisfy short-term daily needs arising during retirement. The magnitude of these needs, and of the risks faced by retirees, do not correspond in any meaningful way with one sex or the other. See *Califano v. Goldfarb*, *supra*, and *Fontiero v. Richardson*, *supra*. Nevertheless, by providing equal retirement benefits to men at a lesser cost than to women, Water and Power gave men the opportunity to use this cost differential to purchase additional retirement insurance, and thus provided men with greater protection against the vicissitudes of retired life.

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[7]In *Phillips*, the employer refused to accept employment applications from women with pre-school aged children, although it accepted applications from men with pre-school aged children. About three-fourths of the total job applicants were female, and about three-fourths of the new hirees were female, so that there was no evidence of discrimination against women as a class. Nevertheless, the Court held that Title VII prohibits an employer from maintaining one hiring policy for men and another for women. The Court stated that Title VII "requires that persons of like qualifications be given employment opportunities irrespective of sex." 400 U.S. at 544.

Water and Power's Plan differs from General Electric's disability plan in another important respect. The Plan is not voluntary, but is required under Los Angeles City Charter §220.1. Thus, the Court's analysis in footnote 17 of the *Gilbert* opinion, which hypothesizes a situation where the employer discontinues its disability insurance coverage and increases wages in an amount equal to the cost of the insurance, is inapposite.

The Interpretation of the Bennett Amendment in Gilbert Does Not Undermine the Judgment in Manhart.

While comparing Equal Employment Opportunity Commission ("EEOC") and Wage and Hour Administrator guidelines, the Court in *Gilbert* quoted Senator Humphrey as stating that the purpose of the Bennett Amendment to the Equal Pay Act (29 U.S.C. §206(d)) was to permit differences of treatment in industrial benefit plans, including earlier retirement options for women. Based on this remark, the Court applied an interpretative regulation issued by the Wage and Hour Administrator under the Equal Pay Act to undermine an EEOC interpretation of Title VII.[8]

The Court's deference to the Wage and Hour Administrator's interpretation of Title VII in *Gilbert* cannot help Water and Power in the case at bench. The fact is that the interpretation of Section 206(d) by

[8]Section 703(h) of Title VII provides that: "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if differentiation is authorized by the provisions of section 206(d) of Title 29." 42 U.S.C. §2000e-2(h). Section 206(d), among other things, permits discrimination based on "a differential based on any other factor other than sex."

the Wage and Hour Administrator is *consistent* with the interpretation of Title VII by the EEOC. Indeed, the Secretary of Labor filed an amicus curiae brief in this case before the Court of Appeals asserting that Section 206(d) does not protect Water and Power's classification scheme:

> "Clearly, the mere fact that the men and women are paid the 'same salary' (Appellant's br., p. 8) does not make their rates 'equal' for purposes of the Equal Pay Act if, as here, the 'take-home pay' of the women is less because of their larger compulsory contributions. It is well settled that payments made to satisfy the wage requirements set forth in Section [206] must be 'unconditional' —*i.e.*, they must be 'free and clear' [citation omitted] and the employee must actually have the use of the money [footnote omitted]." Brief of the Secretary of Labor, United States Department of Labor, as amicus curiae, at pages 9-10.

In any event, the Court's treatment of Senator Humphrey's remark, and its interpretation of the Bennett Amendment, was not essential to the decision in *Gilbert*, *i.e.*, that the exclusion of pregnancy disability coverage was not in itself discrimination based on sex. The remark was not even essential to the Court's rejection of the EEOC guideline. If the Court had considered Senator Humphrey's statement as controlling, its inquiry would have begun and ended with his opinion that Title VII does not apply to industrial benefit plans.[9] The Court of Appeal on reconsideration also did not

[9]But this is *not* the case. When Congress amended Title VII in 1972 to extend its protection to state and local government employees, the Conference Report on the 1972 Amend-

(This footnote is continued on next page)

change its decision after explicitly adopting the interpretation of the Bennett Amendment by the Court in *Gilbert*.

Conclusion.

> "The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." Chief Justice Taft in *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923).

Rule 19, Rules of the Supreme Court, sets forth some of the more important criteria considered by the Court in granting or denying certiorari. Rule 19 criteria relevant to this case are whether the Court of Appeals:

> (1) Has decided a federal question in a way in conflict with applicable decisions of the Supreme Court; or

ments stated that: "In any area where the new law does not address itself, or in areas where a specific contrary intention is not indicated, it was assumed that the present case law developed by the courts would continue to govern the applicability and construction of Title VII." Legislative History of the Equal Employment Opportunity Act of 1972, United States Senate (U.S. Government Printing office, Washington, D.C., 1972), at page 1844. Case law in 1972 included the 7th Circuit decision in *Bartmess v. Drewrys, U.S.A., Inc.*, 444 F.2d 1186 (7th Cir., 1971) and the District Court opinion in *Rosen v. Public Service Gas and Elec. Co.*, 477 F.2d 90 (3rd Cir., 1973), both holding, contrary to Senator Humphrey's interpretation, that the forced early retirement of women violated Title VII. Because Congress "has not just kept its silence" by refusing to adopt Senator Humphrey's opinion on the applicability of Title VII to industrial benefit plans, "but has ratified it with positive legislation," his remark ought to be ignored by the Court. *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367, 381-382 (1969).

> (2) Has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision.

Defendants have not demonstrated that either of these criteria are present in the case at bench.

A. The Court of Appeals Decision Is Not in Conflict With Applicable Decisions of the Supreme Court.

Based on the above analysis, plaintiffs submit that the Court of Appeals decided this case in strict accord with the principles set forth by the Court in the *Gilbert* case.

First, Water and Power's Plan used actuarial tables to predict longevity of life which were based on one factor and one factor only—the sex of the Plan participant. Although women as a class may live longer than men, Water and Power ignored other more relevant longevity factors such as smoking and drinking habits, normality of weight, prior medical history, and family longevity history. There is no excuse for the administrative shortcut taken by Water and Power. Although this objective may have some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois, supra.*

Moreover, unlike *General Electric*, Water and Power divided potential pensioners into two groups, one exclusively female and the other exclusively male. On the basis of this classification, it required women to contribute from their wages 15 percent more to the Plan than their male counterparts to receive equal benefits. This is the very type of discrimination based

on gender as such which the court struck down in *Califano v. Goldfarb, supra; Craig v. Boren, supra; Frontiero v. Richardson, supra;* and *Reed v. Reed, supra.* Not only did this classification bear no substantial relation to the purposes of Water and Power's Plan, but it discriminated against short-lived women contrary to the rule set forth in *Phillips v. Martin-Marietta, supra.*

Water and Power's Plan also discriminated against women in its impact. Unlike *General Electric,* Water and Power did not offer men and women an identical package. All women, regardless of their prior medical history and other factors affecting longevity of life, were required to contribute more to the Plan than men only to receive the same benefits. This practice permitted men to apply their greater take home pay toward additional retirement insurance and thus provided men with greater risk protection against problems encountered in retired life.

B. The Court of Appeals Has Not Departed From the Accepted Course of Judicial Proceedings as to Merit the Exercise of the Supreme Court's Supervision.

The Court of Appeals decided this case on November 25, 1976 in favor of plaintiffs. The Court's well-reasoned opinion was based on existing case law, administrative interpretations of the relevant statutes, and an extensive analysis of the legislative history underlying those statutes.

Two weeks later, on December 7, 1976, the Court decided the *Gilbert* case. Armed with this decision, defendants requested a rehearing *en banc.* In light of the *Gilbert* opinion, the Court of Appeals once again examined existing case law, administrative interpretations and legislative history. Once again, the Court of Appeals ruled in favor of plaintiffs.

Defendants have had three bites from the apple, including their hearing before the District Court. Now they are hungry for more. Plaintiffs submit, along with Chief Justice Taft, that the Supreme Court has more important matters to consider than to give the defeated party in the Court of Appeals another hearing. This is especially true in light of the fact that the California State Legislature, in Government Code §7500, outlawed Water and Power's use of sex-segregated classification tables effective January 1, 1975. Accordingly, plaintiffs respectfully request that defendants' Petition for Writ of Certioriari to the Ninth Circuit Court of Appeals be denied.

Dated: July 19, 1977.

Respectfully submitted,

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